APPENDIX A

Filed 18 day of Oct., 1966
V. Bailey Thomas, Clerk
By Albert E. Anderson, Deputy

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANDREW NICHOLSON, *Plaintiff*, v. C. D. CALBECK, DEPUTY COMMISSIONER, ET AL, *Defendants.*	CIVIL ACTION No. 65-H-63

Mandell & Wright (Herman Wright) of Houston, Texas; for plaintiff.

Jack Shepherd, Assistant U. S. Attorney of Houston, Texas; for Deputy Commissioner.

Fulbright, Crooker, Freeman, Bates & Jaworski (S. G. Kolius and Ed Bluestein, Jr.) of Houston, Texas; for Crown Stevedoring Company and Texas Employers' Insurance Association.

October 18, 1966

Memorandum:

This case comes to the court upon a complaint filed by the plaintiff seeking to enjoin the enforcement of a compensation order issued by defendant Deputy Commissioner on January 13, 1965. The action is now before the court

for consideration of motions for summary judgment filed by both plaintiff and defendants.

The case is presented to this court on the pleadings of the parties, the record developed in the hearing before the defendant Deputy Commissioner, and is accompanied by extensive briefs submitted on behalf of all parties. There is no dispute between the parties as to the facts as found by the Deputy Commissioner, but they differ sharply as to the legal conclusions which may be arrived at from the record.

The sole question presented to this court is whether the loss occasioned by the plaintiff's injury is compensable under the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. 901, et seq. ("Longshoremen's Compensation Act").

The pertinent facts in this case are as follows: The plaintiff, a longshoreman, was assigned to work on the Manchester wharf in Houston, Texas, unloading a merchant vessel on the day the injury occurred. This wharf is a concrete structure and is attached to the land. The waters of the Houston Ship Channel flow under a portion of the wharf.

On the morning of the day the injury occurred, two large hatch beams had been removed from the ship and placed on the wharf by means of the ship's winches. These beams were placed on wooden pallets, one atop the other. Later in the day, it became necessary to shift the vessel farther up the wharf and members of the longshoremen gang were instructed to move the hatch beams up the wharf. The beams were being moved up the wharf by means of two forklift vehicles when the injury occurred. As the beams were being carried past the plaintiff, who was standing on

the wharf, the top beam fell from the pallet on which it was placed and struck and seriously injured him.

The plaintiff made application for compensation pursuant to Section 913 of the Longshoremen's and Harbor Workers' Compensation Act, and a hearing was held before the Deputy Commissioner for the Eighth Compensation District, C. D. Calbeck, commencing on December 22, 1964. The Deputy Commissioner rejected the plaintiff's claim for compensation on the basis that dockside injuries are not compensable under the provisions of the Longshoremen's Compensation Act.

Section 903 of the Longshoremen's Compensation Act provides:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring *upon the navigable waters of the United States* (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." (Emphasis added).

There is no dispute in this case as to the fact that the plaintiff was injured on the wharf. In light of this fact, it is this court's opinion that the Deputy Commissioner correctly rejected the plaintiff's claim for compensation under the Longshoremen's Compensation Act.

This view is strongly supported by the recent Fifth Circuit case of O'Keeffe, Deputy Commissioner, v. Atlantic Stevedoring Co., Inc., 354 F. 2d 48 (5 CA, 1965). In this case, the Circuit Court of Appeals upheld an award of the Deputy Commissioner to the widow of a longshoreman who was killed while loading a vessel. The court specifically affirmed the fact finding of the Deputy Commissioner that

the injury did not occur on the dock, but occurred over navigable waters after the victim had been lifted from the dock and carried out from the dock and dropped in the water between the ship and the wharf. In discussing the scope of the coverage under the Longshoremen's Compensation Act, the court made these observations at page 50:

> "The difficult problem is the determination as to the place where the injury occurred. It is the place where the injury occurred that determines whether there is Longshoremen's Compensation coverage. *If the ship's boom had swung over the dock, striking and causing the death of Curry, we would not be able to find a basis for recovery under the Act. The place of the injury would have been the dock.*" (Emphasis added).

In the instant case, it is clear the injury occurred on the dock, and thus is not within the scope of the Act.

The recent unreported case of Johnson v. Traynor, Adm. No. 4704 (D. Md. 1965), furnished by the defendants, is directly in point and supports the finding of this court. In that case, Judge Watkins, in an extensive and scholarly opinion, found that the Longshoremen's Compensation Act did not provide coverage for the widow of a longshoreman who fell from a railroad car onto a pier and was killed. The court based its opinion on the fact that the injury occurred on the pier and not "on the navigable waters of the United States."

In Swanson v. Marra Brothers, Inc., 328 U.S. 1, 7 (1946), the Supreme Court in discussing the scope of the Longshoremen's and Harbor Workers' Compensation Act, quoted from Sen. Rep. No. 973, 69th Cong., 1st Sess., p. 16, as follows:

> "These men are mainly employed in loading, unloading, refitting, and repairing ships, *but it should be*

> *remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship* so as to bring them within the maritime jurisdiction of the United States." (Emphasis added).

The Court then stated that the Longshoremen's Compensation Act "is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore." This statement, in conjunction with the long line of authorities holding that a structure permanently affixed to the soil such as a wharf is considered as part of the land, see e.g. T. Smith & Son v. Taylor, 276 U.S. 179 (1928), Industrial Commission of N. Y. v. Nordenholt Corp., 259 U.S. 263 (1922), further supports the prevalent view that the Longshoremen's Act was not intended to cover injuries occurring on a wharf.

Subsequent to the Swanson case, there have been several decisions from the Circuit Courts of Appeals upholding the view that an injury occurring on a dock is not compensable under the Longshoremen's Act. See O'Keeffe, Deputy Commissioner, v. Atlantic Stevedoring Co., Inc., supra; American Export Lines v. Revel, 266 F.2d 82 (4 CA 1959); McGrath Corp. v. Hughes, 264 F.2d 314 (2 CA 1959), cert. denied, 360 U.S. 914.

The plaintiff relies primarily on Calbeck, Deputy Commissioner, v. Travelers Ins. Co., 370 U.S. 114 (1962), in support of his position. As Judge Watkins stated in his opinion, Johnson v. Traynor, supra, at page 24, a careful reading of the Travelers Ins. Co. case shows that it doesn't support the plaintiff's position, but is actually contra to it. In the Travelers Ins. Co. case, the court finds specifically that the injury occurred on navigable waters and further observes that the purpose of the Longshoremen's Act was

to provide a remedy for injuries occurring *on navigable waters*. In the case now before this court, the injuries did not occur on navigable waters, but rather on a wharf adjacent to navigable waters.

The plaintiff cites Spann v. Lauritzen, 344 F. 2d 204 (3 CA 1965), cert. denied, 382 U.S. 938, Huff v. Matson Navigation Co., 338 F. 2d 205 (9 CA 1964), cert. denied, 380 U.S. 943 (1965), and Forkin v. Furness Withy & Co., Ltd., 323 F. 2d 638 (2 CA 1963), as holding that a court has admiralty jurisdiction over a longshoreman injured on a dock. These cases are not applicable to the case before this court as none of them arose under the Longshoremen's Compensation Act. This court recognizes that the traditional "maritime jurisdiction" for torts is broader than the limitation of coverage to injuries occurring "on navigable waters" found in the Longshoremen's Compensation Act. Johnson v. Traynor, supra. This court does not find the dicta in Caldaro v. Balt. & Ohio. R.R. Co., 166 F. Supp. 833 (E.D.N.Y. 1956), presuasive in light of subsequent cases reviewed earlier in this opinion.

Accordingly, this court holds that the compensation order denying compensation benefits complained of in this case is in accordance with the law.

The plaintiff's motion for summary judgment will be denied. The defendants' motion for summary judgment will be granted.

The clerk will notify counsel to draft and submit appropriate judgment.

/s/ Joe Ingraham
United States District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24342

ANDREW NICHOLSON,
Appellant,

versus

C. D. CALBECK, Deputy Commissioner, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(October 31, 1967.)

Before WISDOM and GOLDBERG, Circuit Judges, and SEALS, District Judge.

PER CURIAM: This appeal is from a judgment dismissing the complaint brought by an injured employee, the appellant, under 33 U.S.C. § 921(b) and 5 U.S.C. 700, to review and set aside the determination of the Deputy Commissioner that the claimant was not entitled to benefits under the Longshoreman's and Harbor Workers' Act, 33 U.S.C. § 903(a).

On May 26, 1960, Andrew Nicholson, claimant-appellant, was injured while performing service as a longshoreman for his employer. He performed his work upon a pier erected on pilings and concrete blocks resting on the bed

of navigable waters of the United States. The inshore edge of the pier is attached to the outboard edge of the employer's warehouse, a portion of which is also over water so that the inshore edge of the pier is not attached to or supported by land. In preparing to load the SS "Mary Sophia", some "tween deck beams" were placed on the pier. During the loading it became necessary to move the vessel. Rather than place the beams back on the vessel, forklifts were used to move the beams to the vessel's new position. As Nicholson was assisting in this moving, the beams slid from their resting place on the forklifts, striking him on the back of his legs. The Commissioner and the district court held that the accident did not come within the provisions of the Longshoremen's Act because the claimant was not injured "upon the navigable waters of the United States".

The disposition of this case is controlled by the recent decision of this Court in *Travellers Insurance Company v. Shea, Deputy Commissioner, and McCollough*, No. 23492, decided August 9, 1967. In *McCullough* this Court held that the waters under a floating pier permanently attached to the shore were no longer "navigable waters". The Court distinguished between waters under a pier and waters under a vessel. See *Michigan Mutual Liability Co. v. Arrien*, 2 Cir. ....., 344 F. 2d 640.

In the present case, the Deputy Commissioner found as a fact that the waters underneath the pier continued to be freely navigable by small crafts. Photographs demonstrate that no small craft larger than a canoe could navigate under the pier. The limited navigability of the waters under the pier is characteristic of piers generally and as a matter of law is not navigability within the meaning of the term "navigable waters".

The judgment is AFFIRMED.

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

ANDREW NICHOLSON
Claimant
v.
CROWN STEVEDORING COMPANY
Employer
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Insurance Carrier

COMPENSATION ORDER
REJECTION OF CLAIM
Case No. 4455-[illegible]

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been duly held in conformity with law,

The Deputy Commission makes the following

FINDINGS OF FACT

1. On May 26, 1960, the employee above named was in the employ of the employer above named, whose address was 324 Shell Building, Houston, Texas, in the Eighth Compensation District. The employer was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the employee herein sustained injury resulting in disability, while performing service as a longshoreman for the employer upon a dock, wharf, or pier and hereafter referred to as "dock." On said day said stevedoring work on the S/S "MARY SOPHIA" was being performed by the Crown Stevedoring Company. The said dock was upon, over or above navigable waters of the United States. Said dock was erected on pilings and concrete blocks which rested in the bed of navigable waters of the United States. The inshore edge of the dock is attached to the outboard edge of the employer's warehouse, a portion of which likewise is upon, over or above navigable waters of the United States so that the inshore edge of the dock is not attached to or supported by land. In preparing the vessel to load some cargo, some 'tween deck beams were placed out on the dock because there was no place on the vessel to stow the beams, as the hatch cover was removed. A pallet was placed on the dock and the first beam placed on its side on the pallet.

3. Later in the day, it became necessary to shift the vessel. Rather than place the beams back on the vessel to be shifted with the vessel itself, forklifts were used to pick up the beams and thus carry them down the dock to the new position of the vessel. The employee proceeded on down the dock to where the vessel was shifted. As he reached a point about midway of the two ends of the beams, one of the fingerlifts hit a railroad track on the dock which caused the loads to bounce. The said beams were part of the ship's gear used to cover up the hatch openings.

4. The employee sustained his injury while assisting in moving portions of the vessel (its hatch beams) to a new loading location for the vessel alongside the said dock. As two of the employee's fellow gang-members were moving the beams along the dock by means of forklifts, the beams

slid from their resting place on the forklifts, striking employee on the back of his legs.

5. The employee sustained an above-the-knee amputation of the right leg. The left lower leg, below the knee, the skin over the middle half of the leg was very thin. There were several small areas where the skin had been broken and adhered. The skin adhered or stuck to the tibia or leg bone. There was a well-healed, curved, surgical incision on the middle third at the front of the leg. There was marked tenderness immediately below this. There was a slight swelling of the left foot in the metatarsophalangeal joint, where the little toe joins the foot, which was dislocated. The range of motion of the ankle was limited to ten degrees. There were healed fractures of the first, second, and fourth metatarsals with mal or angular union and dislocation of the little toe on the metatarsal.

6. The employee cannot stand properly on the left foot without crutch or crane. He cannot do any significant amount of manual labor. The employee is 63 years of age. His work experience is limited to manual labor and his education extends only to the third grade. Following the injury the employee was incapable of performing his pre-injury work and therefore he had suffered an impairment of his wage-earning capacity, i.e.: permanent total disability.

7. It is common practice in the Port of Houston for some longshoremen to work on the dock and later on the vessel or first on the vessel and later on the dock. There is an interchange of such work. The employees report to the Union Hall for hiring. Any time a gang is called to work general cargo, some members of the gang may work on the vessel and some on the dock, but the employees of the gang do not know at the Union Hall whether the work assignment

is to be on the dock or on the vessel. After the gang reaches the vessel, they learn what work is to be done, and the work assignment is then given. There is no difference in the rate of pay of the gang except for the foreman, whether they are working on the vessel or on the dock, but there might be a pay differential depending on the type of cargo handled.

8. At the time of the employee's injury the employer had other employees who were engaged in maritime employment upon the navigable waters of the United States.

9. Longshore work includes the loading or unloading of cargoes or moving or handling the same on any dock, platform or place or in any warehouse or other place of storage. This is a dockside accident that arose out of and in the course of the employee's employment. At the time of the employee's injury, he was engaged in service connected with the loading of a vessel. Taken as a whole, the accident occurred on the dock which was a means, or connecting link, in furnishing ingress to and egress from the said vessel.

10. Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the employee with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the employee at the time of injury was $94.46. He was not paid full wages for day of injury.

11. As a result of the injury the employee became wholly disabled on May 26, 1960, and such disability is continuing and is permanent.

12. The employer and the insurance carrier have paid $6,160.00 as disability benefits under the Texas Workmen's Compensation Act, for which they are entitled to take credit.

Upon the foregoing findings of fact, it is ORDERED by the Deputy Commissioner that the claim for compensation be and it is hereby REJECTED for the following reason:

There is no authoritative determination that a dockside accident comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Galveston, Texas, this 13th day of January, 1965.

/s/ C. D. Calbeck

C. D CALBECK

Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent to the claimant, the employer, and the insurance carrier at the last known address of each as follows:

By Registered Mail:

ANDREW NICHOLSON	779 Rosie Houston, Texas
CROWN STEVEDORING COMPANY	c/o Texas Employers Insurance Association 338 South Wayside Drive Houston, Texas
TEXAS EMPLOYERS' INSURANCE ASSOCIATION	338 South Wayside Drive Houston, Texas

By Regular Mail:

Mandell & Wright, Attorneys	South Coast Building Houston, Texas
Fulbright, Crooker, Freeman, Bates & Jaworski, Attorneys	Bank of the Southwest Bldg., Houston, Texas
Bureau of Employees' Compensation	U. S. Department of Labor Washington, D. C. 20211

/s/ C. D. Calbeck
C. D. CALBECK
Deputy Commissioner

Mailed: January 13, 1965